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July 30, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand Delivery

Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Dear Sir:

Re: Docket RM 9101

Enclosed are an original and 14 copies of the Reply Comments of KMC Telecom, Inc. and RCN Telecom Services, Inc. in Support of Petition for Expedited Rulemaking on Operations Support Systems. One of the attachments to these Reply Comments, the Second Declaration of Joseph Kahl, is a faxed copy. The original has been sent to us by an overnight service and we will deliver it to you tomorrow.

Respectfully submitted,



Robert V. Zener

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Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Petition for Expedited Rulemaking)
To Establish Reporting Requirements and) RM 9101
Performance and Technical Standards for)
Operations Support Systems)
_____)

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JUL 30 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**REPLY COMMENTS OF KMC TELECOM, INC. AND
RCN TELECOM SERVICES, INC.
IN SUPPORT OF PETITION FOR EXPEDITED RULEMAKING ON
OPERATIONS SUPPORT SYSTEMS**

KMC Telecom, Inc. ("KMC") and RCN Telecom Services, Inc. ("RCN") submit these reply comments in support of the Petition for Expedited Rulemaking filed by LCI International Telecom Corp. ("LCI") and Competitive Telecommunications Association ("CompTel"), requesting the Commission to establish requirements for access by CLECs to the OSS functions of incumbent local exchange carriers.

Since the opening comments were filed, the United States Court of Appeals for the Eighth Circuit decided Iowa Utilities Board v. Federal Communications Commission, Nos. 96-3321 et al. ("Local Competition Decision"). That decision supports the relief requested in the Petition in two respects. First, it confirms the Commission's authority to establish performance standards for operations support systems. Second, it confirms that the governing legal standard is one that the Petition meets.

1. The Commission Has Authority to Establish OSS Performance Standards.

The Eighth Circuit, while holding that the Commission does not have the broad authority it had claimed to issue regulations implementing section 251, recognized that there are six areas in which section 251 does authorize the Commission to issue implementing regulations.

One of those areas is unbundled access to network elements. As the Eighth Circuit recognized, section 251(d)(2) authorizes the Commission to “determin[e] what network elements should be made available for purposes of [unbundled access].” § 251(d)(2), cited in Local Competition Decision, slip op. at 103 n. 10, 119 n. 23.

In Local Competition Order, the Commission exercised its authority under section 251(d)(2) by concluding that OSS is a network element that must be made available for purposes of unbundled access, and the Eighth Circuit’s decision upheld the Commission. The OSS performance standards sought by the Petition will implement the Commission’s decision by defining what the ILECs must do to make OSS “available for purposes of [unbundled access].” The Eighth Circuit’s decision establishes that the Commission has authority not only to define what network elements must be available to competitors, but also to define what the ILECs must do to make that element available.

In the Eighth Circuit’s decision, the court consistently refused to review the merits of any regulation which it held to be beyond the Commission’s jurisdiction. Slip op. at 113-14, 120, 126 n.26.. Thus when the court undertook to review the merits of several provisions of the Commission’s unbundling regulations, it is clear that the court regarded those provisions as being within the Commission’s authority. The provisions which the court reviewed on the merits included provisions in which the Commission define what ILECs must do in order to make a

network element “available for purposes of [unbundled access].” Thus the court made it clear that such provisions are within the Commission’s authority.

The Eighth Circuit reviewed on the merits three provisions of the Commission’s rules which defined the scope of the ILECs’ duty to make network element available on an unbundled basis::

- i) the provision that ILECs must provide access at levels of quality superior to those levels at which the ILECs provide those elements to themselves, if requested to do so by competing carriers (slip op. 139-40);
- ii) the provision that the ILEC, rather than the requesting carrier, must recombine network elements that are purchased on an unbundled basis (slip op. 141); and
- iii) the Commission’s conclusion that requesting carriers may obtain the ability to provide finished telecommunications services entirely by acquiring access to unbundled elements (slip op. 141-45).

Moreover, the court upheld the Commission’s conclusion that a requesting carrier may obtain the ability to provide finished services entirely through unbundled access to network elements -- a result the court could not have reached without first concluding that the Commission had authority to define this aspect of network element availability. This part of the regulation -- as well as the provisions that the court reviewed on the merits and invalidated -- could only be justified (under the court’s view of the Commission’s authority) as a definition of what an ILEC must do to make network elements “available for purposes of [unbundled access].” Since OSS performance standards would also define “unbundled availability,” they also fall within the scope of the Commission’s authority as upheld by the Eighth Circuit.

The Eighth Circuit was correct in concluding that the Commission has authority to define what “available for purposes of [unbundled access]” means. When the Commission defines what

network elements must be made available on an unbundled basis, its decision could be completely undermined if the ILECs, or any State disagreeing with the Commission's decision, could take a very restrictive view of what "availability" means. For example, the ILECs' failure to make OSS available on a meaningful basis to the competing carriers, as described in the Petition and supporting comments, has rendered virtually meaningless the Commission's decision (upheld by the Eighth Circuit) that OSS is a network element which the ILECs must make available on an unbundled basis.

The Supreme Court has made it clear that where an agency has express jurisdiction over a subject matter, it may exercise ancillary jurisdiction where needed to carry out its expressly granted authority. Thus in United Gas Pipeline Co. v. Federal Power Comm'n, 385 U.S. 83 (1966), the Court sustained an order of the Commission directing a gas pipe line company to purchase gas at a specified rate and in specified volumes, despite the Commission's conceded lack of express statutory authority to regulate the purchase and sale of gas. The Commission had express statutory authority to regulate interstate transportation, and the pipe line company's refusal to purchase the gas had led to an abandonment of interstate transportation. In these circumstances, the Court concluded that "[w]here it is necessary to regulate the purchase of gas in some respects to carry out its expressly granted authority over transportation and sale, the Commission must have authority to do so." 385 U.S., at 90.

Similarly here, it is necessary for the Commission to regulate the ILECs' performance in making OSS available to competitors, in order to carry out its expressly granted authority to define what network elements must be made available. Otherwise, the ILECs' overly restrictive view of OSS "availability" would make a mockery of the Commission's decision that OSS is a

network element that must be made available on an unbundled basis.

Commission authority is also supported by National Association of Reg. Utility Comm'rs v. FERC, 823 F.2d 1377 (10th Cir. 1987). In that case, the court sustained FERC's assertion of jurisdiction over delivery of gas to an interstate pipeline as part of the Commission's jurisdiction over interstate transportation. Any other interpretation, the court held, "would seriously undermine the Commission's authority to regulate the [interstate] transportation service. . . ." 823 F.2d at 1384.

Similarly here, any interpretation depriving the Commission of authority to establish performance standards that must be met to comply with the requirement of unbundled availability of OSS would "seriously undermine" the Commission's determination -- which the Eighth Circuit has now sustained -- that OSS is a network element that must be made available for purposes of unbundled access.

Further support for this conclusion is found in Section 154(i) and 303(r) of the Act, which, as the Eighth Circuit noted, "supply the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute." Slip op. at 103. Here, OSS regulations are "necessary to fulfill" the "primary directive" to the FCC contained in section 251(d)(2) to "determin[e] what network elements should be made available for purposes of [unbundled access]."

2. The Petition Meets the Governing Legal Standards.

Section 251(d)(2) provides that, in exercising its authority to define what network elements must be made available, the Commission must consider whether failure to provide access would "impair the ability of the telecommunications carrier seeking access to provide the

services it seeks to offer.” In addition, section 251(d)(2) provides that, if the network element is proprietary, the Commission must consider whether it is “necessary.” In its Local Competition Order, the Commission concluded that these tests are met as to proprietary elements if a requesting carrier’s ability to compete would be “significantly impaired or thwarted” without access. Local Competition Order ¶ 282. As to non-proprietary elements, the Commission concluded that a competing carrier’s ability to provide a service would be “impaired” if “the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises.” Local Competition Order ¶ 285.

The Eighth Circuit sustained the Commission’s interpretation of the statutory standards, rejecting the ILECs’ contention that the standards should have been interpreted more strictly. Slip op. at 135-39.

There can be no doubt that the Petition meets the statutory standards, as interpreted by the Commission and upheld by the Eighth Circuit. The numerous examples cited in the Petition and supporting comments show that quality declines and cost of service rises when service orders are not filled promptly, billing mistakes are made and not corrected, and numerous other errors and delays result from competitors’ need to handle their interaction with the incumbents’ network on a manual rather than electronic basis. In addition, the competitors’ ability to compete is “significantly impaired or thwarted” as customers blame the competitor for the errors and delay and conclude that the only way to assure trouble-free and prompt service is to keep their business with the incumbent. In these circumstances, OSS performance standards meet the requirements of section 251(d)(2) and are needed to fulfill the statutory purpose of fostering meaningful local exchange competition.

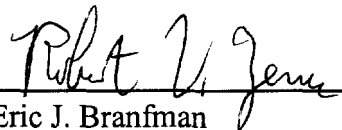
3. OSS Performance Standards Continue To Be Necessary.

The attached Declaration of Joseph Kahl Director of Regulatory Affairs for RCN, shows that, despite the electronic ordering systems described in the Bell Atlantic comments, Bell Atlantic continues to require RCN to fax a written order form for each new RCN customer.

CONCLUSION

The Eighth Circuit decision confirms that the Commission has authority to establish OSS performance standards and that the governing legal standards are ones that the Petition meets. The Petition for Expedited Rulemaking should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Robert V. Zener", is written over a horizontal line.

Eric J. Branfman

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Anthony R. Petrilla

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Dated: July 30, 1997

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Expedited Rulemaking)	
To Establish Reporting Requirements and)	RM 9101
Performance and Technical Standards for)	
Operations Support Systems)	

SECOND DECLARATION OF JOSEPH KAHL

Joseph Kahl declares that:

1. My name is Joseph Kahl. I am the Director of Regulatory Affairs for RCN Telecom Services, Inc. ("RCN"). I previously submitted a declaration in this proceeding (executed on July 10, 1997) on Operational Support Systems ("OSS") issues.
2. This Second Declaration responds to Bell Atlantic's claims to be "making available electronic access to its OSS functions." Reply Declaration of Donald E. Albert, at ¶ 35.
3. RCN resells Bell Atlantic's local service in Allentown, Pennsylvania.
4. RCN has sought to access Bell Atlantic's OSS functions electronically. Despite Mr. Albert's elaborate descriptions of these different functions, Bell Atlantic has so far been unable to provide RCN with access to its OSS functions. Instead, according to reports from the operations personnel of RCN within the last week, Bell Atlantic still requires RCN manually to fill out extensive and burdensome order forms for each new RCN customer and to submit these forms via facsimile machine. Bell Atlantic's ordering process for wholesale service is about as inefficient and cumbersome as you will find among incumbent local exchange carriers.

Pursuant to 47 C.F.R. § 1.16, I declare under penalty of perjury that the foregoing is true

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and correct. Executed on: July 30, 1997.



Joseph Kahl
Director of Regulatory Affairs
RCN Telecom Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Comments of KMC Telecom, Inc. And RCN Telecom Services, Inc. In Support of Petition for Expedited Rulemaking on Operations Support Systems have been served this 30th day of July 1997 by first class mail, postage prepaid, or by hand delivery, to each on the attached service list.



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